

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

KARYN SHAY

Claimant

VS.

ARC HOLDING, LLC.

Respondent

AND

ACE AMERICAN INSURANCE CO.

Insurance Carrier

Docket No. **1,051,045**

ORDER

Claimant requested review of the October 3, 2011 Award by Administrative Law Judge Rebecca Sanders. The Board heard oral argument on January 10, 2012. Due to a conflict, Board Member Gary Terrill recused himself from this appeal and Jeffrey E. King was appointed as a Pro Tem by the Director.

APPEARANCES

Frederick J. Patton II of Topeka, Kansas, appeared for the claimant. Donald J. Fritschie of Overland Park, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

It was undisputed claimant suffered a work-related accidental injury to her left ankle on September 10, 2009. Claimant argued that as a natural consequence of an altered gait she developed from her ankle injury, she suffered a new and distinct permanent injury to her back. Consequently, claimant further argued she was entitled to compensation pursuant to K.S.A. 44-510e for a work disability (a disability greater than the percentage of functional impairment). Conversely, respondent argued claimant was only entitled to compensation for a scheduled disability to her left lower leg pursuant to K.S.A. 44-510d(a)(15).

The Administrative Law Judge (ALJ) found claimant failed to prove that she suffered a permanent impairment to her back and awarded her compensation for a 7 percent permanent partial scheduled disability to her left lower leg pursuant to K.S.A. 44-510d(a)(15). Claimant requests review of the nature and extent of her disability.

The sole issue for Board determination is the nature and extent of disability, specifically, whether claimant is entitled to compensation for a whole person impairment pursuant to K.S.A. 44-510e or to compensation for a scheduled disability to her left lower leg pursuant to K.S.A. 44-510d.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Claimant was employed as a manager of two trailer courts for respondent. On September 10, 2009, claimant was at one of the sites walking in front of the club house with the maintenance man to determine what needed to be painted. As she stepped on the curb to the street her foot rolled, she heard a snap and then fell down. Claimant was transported by ambulance to the hospital. X-rays were taken of claimant's left ankle which showed a non-displaced left distal fibula lateral malleolar fracture. Claimant was placed in a splint and obtained crutches. She was referred to Dr. Howard Wilcox for follow-up examination and care.

On September 15, 2009, claimant had her first appointment with Dr. Wilcox. Claimant was placed in an air cast walking boot. But she had difficulties ambulating and was provided a walker. Claimant noted the air cast raised her left foot about two inches higher than her right foot. This difference caused claimant to walk with an altered gait.

Claimant returned to light-duty desk work on October 29, 2009, with the air cast walking boot still on her left foot. She was provided a walker and claimant described having to bend over to use the walker. Claimant testified that when she returned to work she noticed the onset of lower back pain.

At claimant's November 25, 2009 office visit with Dr. Wilcox, it was recommended that she start physical therapy. Claimant was evaluated and began physical therapy on December 10, 2009. It was noted in a progress summary report dated December 22, 2009, that claimant was taking normal stride lengths with just minor limitations with heel to toe motion. But in a progress report dated January 15, 2010, it was noted that after slips on ice claimant had back pain. Claimant explained the incident on the ice in the following fashion:

Q. In the physical therapy notes of January 2010, there's a reference to an incident involving ice. Can you tell us what happened there?

A. Well, we had an ice storm around that time, that week, and the parking lot where the physical therapist was was a sheet of ice and I had difficulty getting in the building. I didn't fall, but I was afraid I was going to fall and everything tensed up from my feet all the way up, I'm assuming, but slipping on the ice affected my low back considerably.¹

By March 3, 2010, it was noted in the physical therapy progress notes that claimant was having fewer bad days with her low back and by April 12, 2010, claimant was able to go heel to toe through the gait cycle without much problem. There was mention of periodic back guarding in the physical therapy notes. On April 14, 2010, Dr. Wilcox determined claimant had reached maximum medical improvement and released her from treatment but noted she could return as needed.

Dr. John Gilbert, who is board certified in orthopedic surgery and in independent medical evaluation, examined and evaluated claimant on May 12, 2010, at the request of respondent's attorney. The doctor took a history of claimant's present illness and reviewed her medical records. Upon physical examination, Dr. Gilbert found claimant's stance and gait were unremarkable and she could also walk on her heels and toes. The doctor diagnosed claimant as having left lateral malleolar tip avulsion with a good result following conservative treatment. Dr. Gilbert testified that when he asked claimant if she had any other medical problems besides her ankle she responded that she had hypertension.

Based upon the AMA *Guides*², Dr. Gilbert gave claimant a 7 percent left lower extremity impairment using the range of motion model. No further medical treatment was recommended and no permanent restrictions were imposed. Dr. Gilbert reviewed the list of claimant's former work tasks prepared by Mr. Terry Cordray and concluded claimant could perform all of the 29 tasks.

Dr. Daniel Zimmerman, who is board certified in independent medical evaluation, examined and evaluated claimant on August 31, 2010, at the request of claimant's attorney. Claimant complained of pain and discomfort in her lumbosacral spine and left ankle. The doctor reviewed claimant's medical records and also took a history from her. Upon physical examination, Dr. Zimmerman found claimant had tenderness from L1 through S1, no spasm of lumbar paraspinous musculature and positive sciatic notch

¹ R.H. Trans. at 13.

² American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the AMA *Guides* unless otherwise noted.

tenderness in palpation on the right side. Claimant also had pain affecting the left ankle and lack of motion in the left ankle caused her to be incapable of performing a full deep knee bend. The doctor ordered x-rays of claimant's lumbosacral spine as well as her left foot and ankle. X-rays showed osteoarthritic changes throughout the lumbar spine at L1-2, L2-3 and L3-4, disc space narrowing at L5-S1, and there was no spondylolisthesis.

Due to claimant's chronic lumbar paraspinous myofasciitis with permanent aggravation of the lumbar degenerative and osteoarthritic change at L5, S1 due to the left fibular fracture, Dr. Zimmerman rated claimant's lumbar spine at 5 percent based upon the *AMA Guides*. The doctor also gave claimant a 10 percent impairment to the left lower extremity at the ankle level due to the left fibular fracture. The left lower extremity impairment converts to a 4 percent whole person impairment. Using the combined value charts, Dr. Zimmerman opined claimant had an overall 9 percent permanent impairment to the body as a whole.

Dr. Zimmerman did not recommend any additional diagnostic or therapeutic treatment. The doctor placed permanent restrictions on claimant of no lifting greater than 20 pounds occasionally and 10 pounds frequently. Claimant was also to avoid frequent bending, stooping, squatting, crawling, kneeling and twisting activities which causes pain in her lumbar spine and left ankle. Dr. Zimmerman reviewed the list of claimant's former work tasks prepared by Mr. Dick Santner and concluded claimant could no longer perform 6 of the 27 tasks which calculates to a 22.2 percent task loss.

Dr. Zimmerman testified:

Q. In your narrative report which has been offered as Exhibit 2, did you make reference anywhere to the Claimant having the treatment to her low back after her accident?

A. The only reference is that she said she reported it to Dr. Wilcox and Dr. Gilbert I believe is what she said. There is no indication in the report that she received treatment from them.

Q. Meaning there is no indication in either the report of Dr. Gilbert or the treatment records of Dr. Wilcox to low back treatment?

A. I don't think there is.

Q. Is there any reference in Dr. Gilbert's report or the treatment records of Dr. Wilcox which makes reference to complaints of low back pain, are there?

A. No. They didn't write them, no.³

Dr. Zimmerman also did not know when claimant began experiencing low back pain after she injured her ankle nor when she developed an altered gait. And Dr. Zimmerman agreed that when he examined claimant her gait was normal.

Dr. Chris Fevurly, who is board certified in internal and preventive medicine, examined and evaluated claimant on June 24, 2011, at the request of respondent's insurance carrier. The doctor reviewed claimant's medical records and also took a history from her. Upon physical examination, Dr. Fevurly found claimant had pain with extreme ranges of flexion and extension in the lumbar area as well as mild loss in left foot dorsiflexion to 10 degrees compared to 30 degrees on the right and mild tenderness over the left distal tibia which is not over the location of the lateral malleolar fracture. The doctor opined that claimant's accidental injury resulted in left distal fibular/lateral malleolar fracture and mild residual loss of dorsiflexion.

On cross-examination, Dr. Fevurly agreed that an altered gait can cause symptoms in the back. And Dr. Fevurly agreed that when he examined the claimant she had a limp. But Dr. Fevurly opined:

There was intermittent report of low back pain from the physical therapist but no documentation of the same by the managing orthopedic doctors. There is no objective evidence for permanent injury or impairment to the lumbar spine or hips as the result of the 9/10/09 event. There may have been intermittent exacerbation of her sporadic spinal pain as a result of an altered gait but this has not resulted in permanent injury to the lumbar spine or hips.⁴

Based on the *AMA Guides*, Dr. Fevurly rated claimant's left lower extremity at 7 percent due to loss of ankle dorsiflexion. He further opined claimant had a 0 percent functional impairment to her back. Dr. Fevurly concluded that claimant did not need any permanent restrictions or limitations. The doctor reviewed the task list prepared by Mr. Cordray and determined claimant could perform all of the tasks.

Claimant testified that she began having problems with her back towards the end of October. She still has problems with her back aching, muscle spasms and pain from her ankle as well. Claimant complains of constant low back pain. And claimant testified that she told all the doctors both during treatment with Dr. Wilcox and upon examination by Dr. Gilbert that she had back pain.

³ Zimmerman Depo. at 13.

⁴ Fevurly Depo., Ex. 2 at 7.

Claimant testified that during the time she was receiving physical therapy for her ankle she also received manipulation for her back. On cross examination, claimant further testified:

Q. Did you receive any medication for your back?

A. No.

Q. Any surgery?

A. No.

Q. Any injections?

A. No.

Q. As I understand it, you continued to work for let's call them ARC until March the 31st of 2010.

A. Correct.

Q. You returned to work following your injury in October of '09?

A. Yes.⁵

Claimant testified that she returned to work full time and was earning the same salary as before her accident. Claimant continued working for respondent until March 31, 2010, when she was terminated. Claimant has not worked since being terminated but she has been receiving unemployment benefits.

Dick Santner, a vocational rehabilitation counselor, conducted a personal interview with claimant on March 15, 2011, at the request of claimant's attorney. He prepared a task list of 27 nonduplicative tasks claimant performed in the 15-year period before her injury.

Mr. Terry Cordray, a vocational rehabilitation counselor, conducted a personal interview with Ms. Shay on June 3, 2011, at the request of respondent's attorney. He prepared a task list of 29 tasks claimant performed in the 15-year period before her injury.

The sole issue is whether claimant should be compensated for a scheduled disability pursuant to K.S.A. 44-510d or a non-scheduled whole person impairment pursuant to K.S.A. 44-510e. Claimant argues that her altered gait caused injury and

⁵ R.H. Trans. at 26.

permanent impairment to her lower back.⁶ And such impairment to the whole person would be compensable pursuant to K.S.A. 44-510e.

The determination of the existence, extent and duration of the injured worker's incapacity is left to the trier of fact.⁷ It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony with the testimony of the claimant and others in making a determination on the issue of disability. The trial court must make the ultimate decision as to the nature and extent of injury and is not bound by the medical evidence presented.⁸

The medical evidence is in dispute regarding the significance of claimant's back complaints. The doctors disagree whether claimant has a permanent impairment as a result of the altered gait she developed after her ankle injury. Only claimant's medical expert determined claimant suffered permanent impairment to her low back. But he was unaware when claimant developed her altered gait and he noted that when he examined claimant she did not have an altered gait.

When claimant completed her physical therapy in April 2010 it was noted that she was able to go heel to toe without significant problems. When claimant was examined by Dr. Gilbert she did not exhibit a limp. And although claimant said she complained to all the physicians about her back, Dr. Gilbert noted she only had ankle complaints when he examined her. Moreover, Dr. Gilbert testified that when he specifically asked claimant if she had any other medical problems she only mentioned hypertension. And when claimant's medical expert, Dr. Zimmerman, examined her she did not exhibit a limp. Consequently, after claimant concluded her physical therapy she did not have a limp when examined by Drs. Gilbert and Zimmerman in 2010. But when claimant was later examined by Dr. Fevurly in June 2011, she exhibited a limp.

The evidence established that claimant developed a limp as a result of her ankle injury and as she received physical therapy she complained of episodic back pain. Claimant's limp apparently resolved after physical therapy as none was detected when she was examined by rating physicians in 2010. And, other than some manipulations for her back that claimant said she received while in physical therapy for her ankle, claimant neither requested nor received any medical treatment for her back after she concluded her physical therapy. As noted by Dr. Fevurly this would indicate that any involvement to

⁶ See, *Chinn v. Gay & Taylor, Inc.*, 219 Kan. 196, 547 P.2d 751 (1976); *Jackson v. Stevens Well Service*, 208 Kan. 637, 493 P.2d 264 (1972).

⁷ *Boyd v. Yellow Freight Systems, Inc.*, 214 Kan. 797, 522 P.2d 395 (1974).

⁸ *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 785, 817 P.2d 212, rev. denied 249 Kan. 778 (1991).

claimant's low back was, at worst, a temporary situation for which no permanency can be assessed. The Board finds Drs. Gilbert and Fevurly's opinions more persuasive and concludes that claimant did not suffer permanent impairment to her lower back as a natural and probable consequence of her ankle injury and is not in need of permanent restrictions for her back. Therefore, the Board finds that as a result of the September 10, 2009, date of accident, claimant has suffered permanent injury to her left lower leg only, and is entitled to compensation pursuant to K.S.A. 44-510d(a)(15).

K.S.A. 44-510d(a)(23) provides:

Loss of a scheduled member shall be based upon permanent impairment of function to the scheduled member as determined using the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.

The ALJ analyzed the evidence regarding claimant's permanent impairment to her left lower extremity in the following fashion:

The best indicator of the extent of Claimant's permanent impairment to her left lower extremity is the seven percent impairment found by both Dr. Gilbert and Dr. Fevurly. Both doctors made specific references to *The Guides* in assigning their rating. Dr. Zimmerman assigned a ten percent impairment rating to the left lower extremity but provides no basis in *The Guides* for such an opinion. It is found and concluded that Claimant has a seven percent impairment to the left lower extremity.⁹

The Board agrees and affirms.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.¹⁰ Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

AWARD

WHEREFORE, it is the decision of the Board that the Award of Administrative Law Judge Rebecca Sanders dated October 3, 2011, is affirmed.

IT IS SO ORDERED.

⁹ ALJ Award (Oct. 3, 2011) at 9.

¹⁰ K.S.A. 2010 Supp. 44-555c(k).

Dated this _____ day of February, 2012.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Frederick J. Patton II, Attorney for Claimant
Donald J. Fritschie, Attorney for Respondent and its Insurance Carrier
Rebecca Sanders, Administrative Law Judge